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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, *et al.*, *Appellant*,

vs.

JOHN C. DANFORTH, ATTORNEY GENERAL OF MISSOURI, *et al.*

No. 74-1419

JOHN C. DANFORTH, ATTORNEY GENERAL OF MISSOURI, *Appellant*,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, *et al.*

On Appeals From The United States District Court For The Eastern District of Missouri, Eastern Division

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Motion for leave to file a brief with brief as amici curiae for: D.C. Right to Life Committee (Washington, D.C.); Families For Life (Ronkonkoma, New York); Feminists for Life, Inc. (Columbus, Ohio); Fredericksburg Chapter of the Virginia Society for Human Life; Health Personnel Concerned for Life (Minnesota); Legal Defense Fund For Unborn Children (Alexandria, Virginia); Long Island Coalition For Life (New York); March for Life (Washington, D.C.); Joseph Mauro, State Pro-Life Chairman, Maryland State Council, Knights of Columbus; Missouri Citizens for Life (Jefferson City, Missouri); Passaic County Chapter of the New Jersey Right to Life Committee; Prince George's County Right to Life (Maryland); Prince George's County Voters For Life (Maryland); Diocesan Union of Holy Name Societies of Rockville Centre (Oceanside, New York); Scientists For Life, Inc. (Fredericksburg, Virginia); South Dakota Right to Life Corporation (Sioux Falls, South Dakota); Texas Right to Life, Inc. (Austin, Texas); Virginia Right to Life (Springfield, Virginia); Women For The Unborn (Merrick, New York).

(Amici continued on inside cover)

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Unpublished Research Document:
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Motion For Leave To File A Brief Amici Curiae On Behalf Of The Named Organizations, Petitioners, And Individuals In Support Of The Attorney General Of Missouri.

The interest of the amici is to protect the constitutional rights of unborn persons. For example, the March For Life is an incorporated, nonprofit, national right to life group that organizes the annual mass march to the nation's Capitol on January 22 to present the inalienable right to life of unborn persons to the American people. The amici collectively represent over sixty thousand persons.

The questions of law raised by the amici have not been raised by the parties. The amici brief presents newly discovered evidence which indicates that the Supreme

Court rested its abortion decision, *Roe v. Wade*, 410 U.S. 113, upon erroneous factual evidence. In other words, this new research indicates that if the Supreme Court had been informed of this new evidence, then it could not have reached the conclusion in *Roe v. Wade*, but rather would have been compelled to uphold the constitutionality of the Texas criminal abortion statute.

Since one of the amici did this extensive legal research and since the results have not yet had wide public distribution and discussion, the amici are the only parties capable of presenting this new evidence to the Court. Since the purpose of an amicus curiae brief is to present to a court "legal matter which has escaped its notice, and regarding which it appears to be in danger of going wrong," *Black's Law Dictionary* 107 (4th ed. 1968), an amicus brief appears indispensable in this case. Counsel for Planned Parenthood of Central Missouri has denied consent to file this brief.

This newly discovered evidence is relevant to the case because if the judicial proceedings prove that *Roe v. Wade* rests upon factual errors, then it appears that *Roe v. Wade* will have to be overruled. In that eventuality, there could be no question that the State of Missouri has the power under the Constitution to protect the lives of unborn persons by the statute that was in existence prior to *Roe v. Wade*.

Respectfully submitted,

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Amici Curiae Brief On Behalf Of The Named Organizations, Petitioners, And Individuals, In Support Of The Attorney General Of Missouri.

INTEREST OF THE AMICI

The interest of the amici has already been stated in the accompanying motion.

SUMMARY OF ARGUMENT

The amici contend that newly discovered evidence indicates that *Roe v. Wade* rests upon factual errors which require the overruling of that case.

ARGUMENT

The purpose of this brief is to present, in outline form only, the evidence that appears to establish that *Roe v. Wade*, 410 U.S. 113, rests upon factual errors. Since the research documentation is too voluminous and detailed to reproduce here, a copy has been placed in the file of this case. See EXHIBIT A: EVIDENCE FOR JUDICIAL NOTICE CONCERNING *ROE v. WADE*. (Hereinafter cited as "Exhibit")

A. IN *ROE v. WADE*, THE COURT TOOK JUDICIAL NOTICE OF EVIDENCE THAT IS FACTUALLY WRONG.

Key factual errors concern the purpose of the criminal abortion statutes, existing at the time the Fourteenth Amendment was adopted, to protect the lives of unborn children. If the purpose of all those criminal abortion statutes was to protect the unborn child, and if nothing in the Fourteenth Amendment indicates an intent to overrule those abortion statutes, then as Mr. Justice Rehnquist pointed out in his dissent, it shows conclusively that the Fourteenth Amendment did not withdraw from the states the power to protect the lives of the unborn by criminal abortion statutes.

The Supreme Court avoided this conclusion by holding that all these criminal abortion statutes, existing at the time the Fourteenth Amendment was adopted, were intended to protect the life of the mother, and not the life of the unborn child. To reach this conclusion, the Supreme Court made the following errors:

1. The Supreme Court made the unqualified factual assertions that during the 19th century, when the criminal abortion statutes were being enacted, (1) "the [abortion] procedure was a hazardous one for the woman," *Roe v. Wade*, 410 U.S. 113, 148 and (2) that "Abortion mortality was high." *Roe v. Wade*, 410 U.S. 113, 149. These two factual assertions are not true.

The 19th century authorities in obstetrics, not only in America, but also in virtually the entire western world, during the entire time these abortion statutes were being enacted, from 1802 until the adoption of the Fourteenth Amendment, wrote in their obstetric texts that the abortion operation was not hazardous to the life of the mother and their mortality statistics indicate that abortion was no more hazardous to the life of the mother than childbirth. See Exhibit 1-8. This obstetric evidence is extensive and seemingly indisputable. Of course, the abortions described in these 19th century texts were performed to save the life of the child and/or the mother. See Exhibit 5 nn.8 & 9.

2. The Supreme Court cited one single text as authority for its two erroneous assertions that the abortion procedure per se was hazardous for the woman and abortion mortality was high. This was *A Hundred Years of Medicine* 19 (1943) cited in *Roe v. Wade*, 410 U.S. at 148 n.43. This medical history book merely stated in a short chapter entitled "18th Century Surgery And Its Limitations," that in those early days the dangers of infection made major surgery in the chest, the head and the abdomen hazardous to the patient. The book did not make even one single reference to the abortion operation; it was merely a general survey book. On the other hand, the 19th century obstetric textbooks, written to instruct physicians and medical students in obstetric procedures, described the abortion operation and its effects upon the woman in precise detail, and based upon the authors' own direct experiences, stated that the abortion operation was not hazardous to the life of the mother; and the mortality statistics gathered from around the world indicated that abortion was no more hazardous to the life of the mother than childbirth. It is unfortunate that the Supreme Court chose to rest its case concerning this 19th century obstetric procedure upon a 20th century history book about 18th century surgery in general, because the

slightest investigation of the 19th century obstetric authorities would have immediately shown that its unqualified factual assertions were not true. In short, *Roe v. Wade*, 410 U.S. 113, 148 n.43, is a spurious citation. See Exhibit 9-12.

3. Based upon these erroneous factual assertions that abortion was hazardous to the life of the woman and that abortion mortality was high, the Supreme Court founded the conclusion that the purpose of these 19th century criminal abortion laws "was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy," *Roe v. Wade*, 410 U.S. at 149, and the abortion laws were not intended to protect the life of the unborn child. Consequently this is an erroneous conclusion based upon factual assertions that are not true. See Exhibit 8-14.

4. Attempting to corroborate that conclusion, the Supreme Court cited some 19th century case authority to hold that the purpose of the abortion statutes was to protect the life of the woman from the hazardous abortion operation and the laws were not intended to protect the life of the unborn child. However examination reveals these citations to be based upon misquotation. The Court, in various ways, selected statements by 19th century courts that a purpose of the criminal abortion statute was to protect the mother from the criminal abortionist, because criminal abortions were very hazardous to the life of the mother, and misread them to mean that the sole purpose of the law was to protect the woman from all abortions, even by doctors in hospitals, because the abortion procedure per se was hazardous to the life of the mother. See Exhibit 14-27.

As an example of this, in *Roe v. Wade*, 410 U.S. 113, 151 & n.47, the Supreme Court cited C. Means as "scholarly" authority for the conclusion that these 19th century abortion laws "were designed solely to protect the woman." Examination of the basis of this conclusion

by Means shows that it is essentially founded upon the misquotation of *State v. Gedicke*, 43 NJL 86, 96 (1881). The court there held that the punishment of a criminal abortion attempt, in which neither the mother nor the child died, was not cruel and unusual within the prohibition of the Constitution: "It is a reasonable punishment for a heinous crime, which in almost every case endangers the life and health of the woman, and the destruction of the foetus or child." Means selected this statement on the hazards of criminal abortions to both mother and child, and by taking the phrase concerning the mother out of context, misquoted it to mean that all abortions, even by physicians in hospitals, "in almost every case endangers the life and health of the woman." See Exhibit 19. Means then cited this misquotation as evidence that the purpose of the abortion laws was to protect the life of the mother and not the life of the unborn child. See Exhibit 17-21. To enhance his case, Means speculated that the abortion operation in the 19th century was roughly as dangerous to the life of the woman as the deadly Caesarean operation, that is, the removal of the child from the womb by surgically opening the abdomen. See Exhibit 20 n.59, 5 n.8. Of course, Means omitted all the 19th century obstetric authority which stated that the abortion operation was not hazardous to the life of the mother. See Exhibit 1-8. And the Supreme Court repeatedly cited Means as authority for its abortion decision. See *Roe v. Wade*, 410 U.S. at 132 n.21, 133 n.22, 135 n.26, 139 n.33, 148 n.42, 151 n.47.

5. The Supreme Court also cited *Abele v. Markle*, 342 F.Supp. 800, as legal authority that "sharply disputed" that "a purpose of these laws, when enacted, was to protect prenatal life." *Roe v. Wade*, 410 U.S. 113, 151 & n.46. Actually that court based this conclusion on the authority of C. Means, *supra*, that the purpose of the abortion laws was to protect the life of the mother from

the hazards of the abortion operation, and the laws were not intended to protect the life of the unborn child. The court did not consult even one single 19th century obstetric text. See Exhibit 15-17. Consequently another authority relied upon by the Supreme Court also rests upon erroneous factual evidence.

6. The Supreme Court also cited *State v. Murphy*, 27 NJL 112, 114 (1858) as authority that these 19th century abortion statutes were interested in "protecting the woman's health rather than in preserving the embryo and fetus." *Roe v. Wade*, 410 U.S. 113, 151 & n.48. And again this citation is based upon misquotation. The *State v. Murphy* case was concerned with the great hazard to the life of the mother from criminal abortions, not the abortion procedure per se. This case was also misquoted by Means. See Exhibit 21-27.

In short, the primary evidence, which the Supreme Court presented in *Roe v. Wade* to prove that the 19th century abortion statutes were enacted to protect the life of the mother and not the life of the child, is based on erroneous factual assertions; and the evidence presented in *Roe v. Wade* to corroborate these factual assertions is founded upon misquotation.

To summarize, the purpose of these 19th century abortion statutes to protect the lives of unborn children appears conclusively established by two independent sources. First, the obstetric medical evidence, that the abortion operation was not considered hazardous to the mother, shows that the motivating purpose could only have been to protect the lives of unborn children. Second, there is the large volume of statements by leading legal authorities, with none to the contrary, that the purpose of these criminal abortion statutes was to protect the lives of unborn children. See Exhibit 3 n.5, 12 n.40.

B. BECAUSE OF THESE FACTUAL ERRORS, *ROE v. WADE* MUST BE OVERRULED

The amici contend that *Roe v. Wade* must be overruled solely because of these factual errors. However, the amici present the following historical context as useful background material.

The word in the Constitution that was construed in *Roe v. Wade* was the word "person." In all American history, only one other time has the word "person" in the Constitution been construed by the Supreme Court to absolutely deny the protection of the Constitution to a group of persons. That was *Scott v. Sanford*, 19 How. 393, which held that black persons had not been included as persons protected by the Constitution. With a far weaker factual basis, relying generally upon the Declaration of Independence and other historical evidence, Abraham Lincoln denounced the Dred Scott decision as "an astonisher in legal history . . . a new wonder of the world" that was "based upon falsehood." 2 *The Collected Works of Abraham Lincoln* 495 (R. Basler ed. 1953). Historically speaking, Americans have ever been skeptical of conclusions that some group is inferior and consequently was excluded from the protection of the Constitution.

In the context of that great reform movement to guarantee all persons the protection of the law for fundamental rights, the American people adopted the Fourteenth Amendment with the unequivocal language that "nor shall any state deprive any person of life . . . without due process of law." The words "any person" are clear, absolute, and on their face allow no exceptions. And no one has yet discovered anything in the legislative history that the amendment was intended to overrule the near universal legal policy of protecting the lives of unborn children by law, or to create any exceptions to the absolute terms "any person." To the contrary, it was stated repeatedly during the legislative debates that no

objection could be made to the clause that no person could be denied due process or equal protection of the law because it embodied the ideal of the Declaration of Independence. And in interpreting the Fourteenth Amendment the Supreme Court held that "it is always safe to read the letter of the Constitution in the Spirit of the Declaration of Independence." *Gulf, Colo. & S. Fe Ry v. Ellis*, 165 U.S. 150, 159-160 (1897).

Concerning the purpose of the Declaration of Independence to include unborn persons, there appears little doubt that Thomas Jefferson considered the unborn child to be a person who had been "created" and equally endowed with an inalienable right to life. Jefferson, quoting Tertullian with approval, wrote: "Tertullian's words are . . . . 'in ipso ultimo voluptatis aestu, quo genitale virus expellitur, nonne aliquid de anima sentimus exire?' The holy father thus asserting, and, as it would seem, from his own feelings, that the sperm infused into the female matrix deposits there the matter and germ of both soul and body, conjunctim, of the new foetus." 15 *The Writings of Thomas Jefferson* 267 (A. Bergh ed. 1907). Concerning the unborn child, Tertullian had written: "to kill a child before it is born is to commit murder by way of advance; and there is no difference whether you destroy a child in its formation or after it is formed and delivered. For we Christians look upon him as a man who is one in embryo . . ." E. Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 Geo LJ 395, 426 (1961).

These sentiments are in agreement with the findings of science, long established by the time the Fourteenth Amendment was adopted, that at conception a new independent being comes into existence and gradually progresses, both before and after birth, from one degree of perfection to another. See Exhibit 3 n.5, 12 n.40. And the universal statutes that made abortion a crime, unless it were necessary to save the life of the mother, demonstrate the legal intent to protect that new existence.

However, the amici contend, the historical context entirely aside, that the factual errors alone mandate that *Roe v. Wade* must be overruled.

The Supreme Court has ever held that the canons of construction by which it is bound must be rooted in truth and reason. See Exhibit 30-32. As Chief Justice Taney wrote more than a century ago, a constitutional decision by the Supreme Court must be "always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of reasoning by which it is supported." *The Passenger Cases*, 7 How. 283, 470.

This standard of reason, and the factual errors, present the singular question to the Supreme Court: How is it possible that virtually all the states that adopted the Fourteenth Amendment, Exhibit 38 n.119, and the United States Congress which proposed it, Exhibit 38 n.120, had, either before the adoption of the amendment or shortly thereafter, adopted criminal abortion statutes to protect the lives of unborn persons, and at the same time, without comment or explanation, created in the Fourteenth Amendment a constitutional right to kill unborn persons for convenience and absolutely withdrew all power from the states to protect the lives of unborn persons?

The amici respectfully submit that these factual errors cause the most vital part of the Constitution, involving the protection of human life, to be founded upon such a preposterous contradiction, which no reasonable person could entertain, that if *Roe v. Wade* is not overruled, then it would be an undisguised admission that the American Republic is surrendering government by laws based upon truth and reason, and adopting government by men based upon arbitrary will and evidence that is not true.

CONCLUSION

The amici desire full oral argument, where all the facts and rebuttal can be heard by this Court, so that the truth can be determined.

If the alleged errors cannot be explained, then there can be no question that the state of Missouri has the power under the Constitution to protect the lives of unborn persons by the abortion law that was in existence prior to *Roe v. Wade*. And indeed, the evidence is now so overwhelming, that the conclusion in *Steinberg v. Brown*, 321 F. Supp. 741, 746-747 (1970) that, "Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it," appears unavoidable unless the Supreme Court now discovers compelling new historical evidence to the contrary.

Respectfully submitted

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